No. 353.
Bof. of Bosler & Renner for P. C.
Filed Jan. 9, 1899.

Supreme Court U. S.
FILED
JAN 9 1899
JAMES H. MCKENNEY
Clerk.

No. 353.

Supreme Court of the United States.

IN THE MATTER OF THE

Petition of J. B. Thomas for Writ of Habeas Corpus.

Brief for Plaintiff in Error.

CHARLES H. BOSLER,
OTTO J. RENNER,
Attorneys for Plaintiff in Error.

No. 353.

Supreme Court of the United States.

IN THE MATTER OF THE

Petition of J. B. Thomas for Writ of Habeas Corpus.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

THE petitioner is Governor of the Central Branch of the National Home for Disabled Volunteer Soldiers, located in Montgomery County, Ohio. He was arrested, tried, and convicted by a Justice of the Peace in said county upon a charge of serving and furnishing to the inmates of said Home oleomargarine, in violation of a statute of the State of Ohio. The question is one of jurisdiction: (*a*) over the territory; (*b*) over the act complained of.

The legislation of the State and of Congress involved in the case as follows:

Section 3 of the statute under which petitioner was arrested:

"SEC. 3. Every proprietor, keeper, manager, or person in charge of any hotel, boat, railroad car, boarding house, restaurant, eating house, lunch counter, or lunch room, who therein sells, uses serves, furnishes, or disposes of, or uses in cooking, any oleomargarine, shall display and keep a white placard in a conspicuous place, where the same may be easily seen and read, in the dining-room, eating-room, restaurant, lunch-room, or place where such substance is furnished, served, sold, or disposed of, which placard shall be in size not less than ten by fourteen inches, upon which shall be printed in black letters, not less in size than one and

a half inches square, the words, 'Oleomargarine sold and used here,' and said card shall not contain any other words than the ones above described, and such proprietor, keeper, manager, or person in charge shall not sell, serve, or dispose of such substance as for butter when butter is asked for or purported to be furnished or served."

92 Ohio Laws, p. 23.

Violation of said act is made a misdemeanor under Section 5 of the act passed May 16, 1894:

"SEC. 5. Any person violating any of the provisions of this act shall, upon conviction thereof, be fined not less than fifty dollars nor more than one hundred dollars."

91 Ohio Laws, p. 275.

Jurisdiction of the Justice of the Peace is in the county:

"Any Justice of the Peace, within his county and city, shall have jurisdiction in case of violation of the laws to prevent adulteration of food and drink, the adulteration and deception in the sale of dairy products," etc.

Rev. Stat. of Ohio, Sec. 3718 *a*.

The National Military Home was organized in pursuance of the acts of Congress, approved March 3, 1865, and March 21, 1866.

13 U. S. Stat. at Large, p. 509.
14 U. S. Stat. at Large, p. 10.

Said territory was purchased and the title conveyed to said corporation, and thereafter, on April 13, 1867, the Legislature of Ohio passed the following act, as amended May 16, 1868:

"WHEREAS, The managers of the National Asylum for Disabled Volunteer Soldiers have accepted the Ohio Soldiers' Home, and are now caring for the disabled volunteer soldiers of the State therein, and are about to locate a permanent branch of the National Asylum within this State, therefore,

"*Be it enacted by the General Assemble of the State of Ohio*, That the jurisdiction of the lands and their appurtenances which may be acquired by donation or purchase by the managers of the National Asylum for Disabled Volunteer

Soldiers within the State of Ohio, for the uses and purposes of said asylum, be and is hereby ceded to the United States of America; provided, however, that all civil or criminal process issued under authority of the State of Ohio or any officer thereof, may be executed on said lands and in the buildings which may be located thereon, in the same way and manner as if jurisdiction had not been ceded as aforesaid, and the officers, employees, and inmates of said asylum who are qualified voters of this State, by complying with the requirements of the laws that are now in operation or that may hereafter be enacted regulating State, county, and township elections in this State, shall have the right of suffrage at all township, county, and State elections, in the township in which the said asylum may be located."

Ohio Laws, Vol. 64, p. 149.

Said act was passed ceding jurisdiction to the United States of said territory in pursuance of the 17th clause of Section 8 of Article I. of the constitution of the United States, which provides that Congress shall "exercise exclusive legislation . . . . over all places purchased by consent of the legislature of the State in which the same shall be, for the erection of forts, arsenals, dockyards, and other needful buildings."

On January 21, 1871, the Congress of the United States passed an act receding and relinquishing to the State jurisdiction over said territory:

"*Be it enacted by the Senate and house of Representatives of the United States in Congress assembled*, That the jurisdiction over the place purchased for the location of the "National Asylum for Disabled Volunteer Soldiers," etc., and upon which said asylum is located, is hereby ceded to the State of Ohio and relinquished by the United States. And the United States shall claim or exercise no jurisdiction over said place after the passage of this act; provided, that nothing contained in this act shall be construed to impair the powers and rights heretofore conferred upon the Board of Managers of the National Asylum for Disabled Volunteer Soldiers, incorporated under said act, in and over said territory."

U. S. Stat. at Large, 41 Cong., p. 399.

CLAIM.

We contend that the Court below erred in not holding:

First. Jurisdiction over the territory is in the State.

Second. The acts complained of were not done by the Governor by authority of, or in compliance with, any law of the United States.

Third. The rights reserved to the Board of Managers by the act of recession are embodied in the act of incorporation; the State cannot legislate to defeat the object of the corporation; but its police regulations, within that limitation, must be obeyed.

Fourth. When a State statute and a Federal statute can be enforced harmoniously, it must be done.

ARGUMENT.

Congress can exercise exclusive legislation only over such district, not exceeding ten miles square, as may by session of particular States, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.

U. S. Constitution, Art. I., Sec. 8, Par. 17.

The consent of the legislature of the States to the purchase is necessary before the United States can acquire jurisdiction, and it has been held that the title must be in the United States and not in a corporation, or the act of session is void.

In *re* O'Connor, Wis. Rep., Vol. XXXVII., p. 379.

In the case of the *United States* v. *Bevans*, 3 Wheaton, 388 Chief Justice Marshall, in delivering the opinion of the Court, construes the extent of a State's jurisdiction over crimes committed within the territorial limits of a State. The Court says in effect

that the jurisdiction of a State is coextensive with its territory and it cannot be deprived thereof except by cession of its legislature.

Exclusive jurisdiction is original and inherent in the State. To bring an offense within the jurisdiction of the courts of the Union, it must be shown to have been committed without the jurisdiction of any State. It is not the offense committed, but the place in which it is committed, which must be out of the jurisdiction of the State.

United States v. *Bevans*, 3 Wheaton, 388.

Offenses committed within this territory are cognizable by the laws of the State, unless inconsistent with the laws of the United States.

In *re* O'Connor, Wis. Rep., Vol. XXXVII., p. 379.
Clark v. *County*, Wis. Rep. 53, p. 67.
In *re* Kelly, Fed. Rep. 71, p. 545.

"To oust the State of its jurisdiction to support and maintain its laws, and punish crimes, it must be shown that an offense committed within the acknowledged limits of the State is clearly and exclusively cognizable by the laws and courts of the United States."

The People v. *Godfrey*, Johnson's Rep. (N. Y.) 17, p. 225.

The act of recession by Congress restored to the State all the jurisdiction it possessed previous to the act of cession to the United States by the General Assembly of the State.

Renner v. *Bennett*, 21 O. S., p. 431.

"And the United States shall claim or exercise no jurisdiction over said place after the passage of this act."

Act of Recession, U. S. Stat. at Large, Vol. VI., 41 Cong., p. 399.

The Renner case is cited and upheld by the Circuit Court of the United States for the Eastern District of Wisconsin.

In *re* Kelly, Fed. Rep. 71, p. 545.

It is claimed that the acts committed were done by the petitioner in the discharge of his duty as Governor of said National Home, under the authority of the Board of Managers in charge of said institution, by virtue of the acts of Congress incorporating the Home, and by authority of said acts; that they were entirely done and performed on the grounds acquired, used, and controlled by the United States, for the purpose of said home, and with respect to the inmates thereof, only in their maintenance and support by the United States, and not otherwise.

If the jurisdiction of the State of Ohio attaches to this territory, as upheld in the decisions above cited, can the Board of Managers of said Home, through its officers, violate the statute laws of the State having such jurisdiction when the acts constituting the infringement of the statute laws are not necessary for the government and management of the Home, for the purpose for which it was incorporated, nor authorized by any statute of the United States?

"Exclusive jurisdiction is coördinate with exclusive legislation, and this constitutes nothing less than absolute sovereignty; that is, the unlimited power to make, apply, and execute laws."

Renner v. *Bennett*, 21 O. S., p. 431.

This power is now vested in the State of Ohio over the territory in question. The power reserved to the Board of Managers, in the proviso of the act of recession, is to "have perpetual succession, with powers to take, hold, and convey real and personal property, establish a common seal, and to sue and be sued in the courts of law and equity, and to make by-laws, rules, and regulations, not inconsistent with law, for carrying on the business and government of the Home, and to affix penalties thereto."

U. S. Statutes, Sec. 4825.

Ever since the act of recession, in 1871, the inmates and officers of the Home have been held to be citizens of the township, county, and State in which the Home is located, and, as citizens of the State, have exercised all the rights and privileges that attach to every other citizen of the State, and are entitled to the equal protection of the laws of the State, as guaranteed to them under the Constitution.

U. S. Constitution, Art. XIV., Sec. 1.

The purchase of oleomargarine at the Home is made upon the recommendation of the Governor, who submits to the Board of Managers an itemized estimate of the expenses. An itemized statement of the expenses is also required to be submitted to Congress.

U. S. Stat. at Large, Vol. XXIX., p.377, par. 7.
U. S. Stat. at Large, Vol. XXIV., p. 222, par. 2.
U. S. Stat. at Large, Vol. XXV., p. 505, par. 7.

But in the act of Congress appropriating money for the maintenance of the Home, oleomargarine is not mentioned.

"An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1897, and for other purposes."

U. S. Stat. at Large, 54 Cong., p. —.

While it may be that the Governor of the Home serves and furnishes oleomargarine to the inmates thereof by authority of the Board of Managers in charge of said institution, it cannot be said that it is done by virtue of any act of Congress, as the act of Congress simply appropriates money "for subsistence," among the items of which is included "articles of food."

The proviso in the act of recession is " that nothing contained in this act shall be construed to impair the powers and rights heretofore conferred upon the Board

of Managers incorporated under said act in and over said territory." These powers and acts, so far as they affect the case, are to "make by-laws, rules, and regulations, not inconsistent with law, for carrying on the business and government of the Home, and to affix penalties thereto."

U. S. Rev. Stat., Sec. 4825.

The power to make by-laws certainly cannot be construed as a power to make laws; and at any rate the by-laws, rules, and regulations which they are authorized to make merely concern the discipline of the Home, as the words, "affix penalties thereto," would clearly indicate.

Held in *re* Kelly, above cited.
Renner v. *Bennett*, above cited.

The Board of Managers, through the officers of the Home, purchase and distribute all supplies. These supplies are purchased not altogether by money appropriated by Congress, but with any other moneys which may come into the hands of the managers through any other sources, as under Section 4831 of the U. S. Revised Statues the Board of Managers is authorized to receive all donations of money or property made by any person or persons for the benefit of the Home, and to hold or dispose of the same for its sole and exclusive use. The managers therefore do not depend solely upon appropriations from Congress, but as a charitable or eleemosynary corporation, can look to other sources than the Federal government for the means to carry into effect the purposes of the corporation.

Rev. Stat. U. S., Sec. 4831.

With the jurisdiction of the United States removed does not then this corporation stand in the same relation to the State as any other charitable corporation within its jurisdiction, to which it guarantees the right of perpetual succession and the power to make by-laws, rules, and regulations not inconsistent with law for its managment?

Held in *Renner* v. *Bennett*, above cited.

The oleomargarine law of Ohio is a valid exercise by the Legislature of the police power of the State. Similar laws have been upheld by the courts of several States.

Powell v. *Commissioners*, 114 Pa. State, 265.
Pierce v. *State*, 63 Md., 596.
McAllister v. *State*, 72 Md., 390.
Butler v. *Chambers*, 36 Minn., 69.
State v. *Addington*, 12 Mo. App., 214; 77 Mo., 110.
Waterbury v. *Newton*, 50 N. J. L., 534.
Palmer v. *State*, 39 O. S., 236.

In the case of *Powell* v. *Pennsylvania*, 127 U. S., 678, the Supreme Court of the United States held that laws enacted by the legislatures of the States for the public health were a legitimate exercise of the police power, and it was not in the province of the courts to inquire into the fact as to whether such legislation is unwise or unnecessary. Such appeals must be made to the legislature or to the ballot-box, and not to the judiciary.

Reference is made to Parker and Worthington on Public Health and Safety, Sections 285 to 294 inclusive, for a general review of the oleomargarine laws as coming under the police power of the State.

The question then arises, What is the nature and extent of the police power of the State? It is clearly established by the authorities that in the American constitutional system the power to establish the ordinary regulations of police has been left with the individual States, and it cannot be taken from them either wholly or in part and exercised under legislation of Congress. The authority of each of the States is supreme and exclusive, and each State has an undeniable and unlimited jurisdiction within its territorial limits to provide for the safety, welfare, and protection of its citizens, and this power is limited only by the Constitution of the United States and the constitution of each individual State.

Within that limit the Court cannot enquire into the wisdom or validity of the act.

Cooley's Const. Lim., pp. 704, 705, 706, and 707.
Parker & Worthington on Public Health and Safety, Secs. 1, 2, and 3.
Powell v. *Penn.*, 127 U. S., 678.

The Fourteenth Amendment to the United States Constitution does not take from the States the police powers reserved to them at the time of the adoption of the Constitution.

Cooley's Const. Lim., p. 11, Note 2, and cases cited.

The police power of the State cannot be defeated by legislation of Congress. Congress has no power to authorize a business within a State which is prohibited by the State.

License Tax Cases, 5 Wall., 462.

So a vessel registered, or enrolled, or licensed under the acts of Congress, may not only be stopped under the quarantine laws of a State before reaching her port of destination, but the cargo may, if infected, be committed to the flames, although the effect is to preclude the collection of duties that would otherwise accrue to the United States.

Gilman v. *Phila.*, 3 Wall., 713, 731.
Robbins v. *Shelby Dist.*, 120 U. S., 489, 493.

Where the powers of Congress and of the States can both work harmoniously and for the public good both should be obeyed.

Cooley on Const. Lim., p. 707.

Conceding to Congress the right to legislate for this territory, yet until Congress does legislate further than to grant to the corporation the powers enumer-

ated in Sec. 4825, U. S. Rev. Stat., the Board of Managers must give heed to the State laws.

If it were to be held that the police powers of the State, and the laws enacted by the State in its legitimate exercise of such powers would not apply to this territory, then not only the act of the legislature under which this arrest is made, but every other act of the legislature designed to protect the health and safety of the citizens of the State would not apply. This would exclude all quarantine laws, the inspection of all provisions under the inspection laws, and health laws, and every other law to which the inmates of this Home are entitled under the constitutional guarantee that all its citizens shall have the right to the equal protection of the laws.

Respectfully submitted,

CHARLES H. BOSLER,

OTTO J. RENNER,

Attorneys for Plaintiff in Error.